(2)

No. 90-493

Supreme Court, U.S.
FILED
OCT 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondent.

RESPONDENT LOCAL 199'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

THOMAS J. PILACEK
Law Offices of:
THOMAS J. PILACEK
2101 W. State Road 434
Suite 105
Longwood, Fl 32779
(407) 774-9500
Counsel of Record
for Respondent
IBEW Local 199

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

(WITH REGARD TO LOCAL 199 – RESTATED)

II. Whether the District Court properly dismissed Petitioners' claim against LOCAL 199 when such claim had no legal existence apart from Petitioners' claims against the NATIONAL LABOR RELATIONS BOARD.

LIST OF PARENT ORGANIZATIONS, SUBSIDIARIES AND AFFILIATES OF RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO

LOCAL 199 is an autonomous local labor organization located at Fort Myers, Florida. It is affiliated with the International Brotherhood of Electrical Workers, AFL-CIO and with that organization's constituent local and intermediate organizations located throughout the United States. LOCAL 199 has no subsidiaries or dependent organizations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED (RESTATED) i

LIST OF PARENT ORGANIZATIONS, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT IBEW LOCAL 199 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY CERTIORARI SHOULD BE DENIED 4

A. PETITIONERS RAISE NO CONSTITUTIONAL CLAIM AGAINST LOCAL 199 4

B. PETITIONERS RAISE NO SUBSTANTIAL LEGAL CLAIM AGAINST LOCAL 199 4

C. THE DISTRICT COURT'S DISMISSAL OF LOCAL 199 WAS CORRECT 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Electrical Workers vs. Foust, 447 US 42 (1979) 5

NLRB vs. Allis-Chalmers Mfg. Co., 388 US 175, 181 (1967) 6

NLRB vs. Jones & Laughlin Steel Corp., 301 US 1 (1937) 6

Steele vs. Louisville & Nashville Railroad Company, et al., 323 US 192 (1944) 5

Vaca vs. Sipes, 386 US 171 (1967) 5, 6

STATUTES AND OTHER AUTHORITIES:

National Labor Relations Act

§ 9(a), 29 USC § 159(a) ..... *passim*

§ 9(b), USC § 159(b) 5

COUNTERSTATEMENT OF THE CASE

LOCAL 199 would restate the case brought against it[1] as follows.

Petitioners are former employees of a subsidiary of United Telephone Company of Florida, Inc. ["UTF"] named United Telephone Communications Systems, Inc. ["UTCSI"]. In 1987 UTF disbanded UTCSI and integrated it into its own operations under the classification "Business Services Division" ["BSD"]. BSD's original complement of seven business technicians and one warehouse attendant all came from UTCSI. However, before their employment with UTCSI all seven business technicians had been employees of UTF in a bargaining unit represented by IBEW LOCAL 199, with one having had an intervening position with another UTF subsidiary called "UTELCOM", the predecessor employer to UTCSI. Subsequent to the reintegration, UTF added two new technicians having no prior affiliation with UTCSI. (Petition, p. 60(a))[2]

UTC and its predecessor UTELCOM performed work on accounts received from UTF. These accounts had formerly been serviced by communications technicians within the bargaining unit represented by LOCAL 199.

---

[1] For purposes of responding to the Petition LOCAL 199 defers to and adopts the response of the NATIONAL LABOR RELATIONS BOARD with regard to Petitioners' claims against that agency. Should certiorari be granted, LOCAL 199 reserves the right to respond to all issues raised by the petition.

[2] References are to the materials contained within the appendices to the Petition.

When UTF dissolved UTCSI and brought the work back to the BSD, it treated the business technicians and the warehouse attendant as unrepresented employees. (Petition, pp. 60(a)-61(a))

LOCAL 199 claimed that the job categories occupied by the nine technicians and warehouse attendant were within the 1,200-member bargaining unit which it already represented, and demanded to bargain with UTF. UTF disagreed, and filed a unit clarification [UC] petition with the National Labor Relations Board [NLRB or BOARD] seeking to have the Board determine whether the categories were or were not properly a part of the previously certified bargaining unit. (Petition, p. 57(a)) LOCAL 199 then filed an unfair labor practice charge against UTF which alleged that these job categories were simply another name for the "communications technician" job category included within the previously certified unit.

In the UC proceeding UTF claimed that Petitioners' job categories were not properly included within LOCAL 199's certified unit (Petition, p. 57(a), ¶4). That is the identical position taken by Petitioners here.

After an extensive hearing, at which one or more of the Petitioners testified on behalf of UTF, the Board found that even though the duties of the business technicians were remarkably similar to the duties of communications technicians represented by LOCAL 199, nevertheless the positions were not "communications technicians" positions. Because of these similarities, however, the Board determined that the job categories of business technician

and warehouse attendant occupied by Petitioners constituted an "accretion" or addition to the existing bargaining unit and with regard to which UTF was therefore obligated to bargain with LOCAL 199. (Petition, pp. 67(a)-69(a))

After Petitioners filed their complaint with the District Court, the NLRB moved to dismiss on the basis of subject matter jurisdiction. LOCAL 199 filed an Answer Incorporating Defenses which alleged that: (a) the complaint failed to state a claim against LOCAL 199; (b) Petitioners' claim was pre-empted by the Labor-Management Relations Act; and (c) the lower court lacked subject matter jurisdiction. (Petition, pp. 71(a)-75(a)) While preserving these defenses, LOCAL 199 chose preliminarily to file a Motion to Dismiss for failure to add an indispensable party, i.e., UTF, who had initiated the NLRB proceedings forming the subject of Petitioners' claims. (Petition, pp. 76(a)-79(a))

The lower court dismissed the complaint against all parties for lack of subject matter jurisdiction, implicitly reasoning that since no subject matter jurisdiction existed over Petitioners' claims against the NLRB, therefore no jurisdiction existed over Petitioners' claims against LOCAL 199, which depended for their existence upon their claims against the NLRB.

Petitioners appealed the dismissal to the Eleventh Circuit Court of Appeals, which issued a *per curiam* affirmance. They now seek issuance of a Writ of Certiorari from this Court. LOCAL 199 opposes issuance of the Writ.

REASONS WHY CERTIORARI SHOULD BE DENIED

The unsoundness of Petitioners' claim that LOCAL 199 violated an alleged duty of fair representation toward them has been clearly determined by this Court in such a fashion so as to foreclose further argument.

A. Petitioners Raise No Constitutional Claim Against LOCAL 199

In their District Court complaint Petitioners brought a claim against LOCAL 199 which alleged that by failing to provide Petitioners notice of the UC proceeding LOCAL 199 violated Petitioners' right to freedom of association under the First Amendment. (Petition, p. 32(a)) This was properly determined adversely to Petitioners by the District Court (Petition, p. 6(a)) and the Court of Appeals. Petitioners have abandoned that claim before this Court, by failing to raise it.

B. Petitioners Raise No Substantial Legal Claim Against LOCAL 199

The gist of Petitioners' remaining claim against LOCAL 199[3] appears to be that since LOCAL 199, having been made a party to a BOARD-conducted UC proceeding by UTF, took the position in that proceeding that the job categories occupied by Petitioners were properly placed within the previously certified unit, therefore LOCAL 199 owed a duty of fair representation toward Petitioners which LOCAL 199 violated by failing to give them notice of the UC hearing. Petitioners have cited no

---

[3] Which they incorrectly assert is "independent" of their claims against the NLRB, *see post.*

authority in support of this argument since none exists, *nor could* exist under the very rationale creating the duty.

The flaw in Petitioners' reasoning process is that almost fifty (50) years of uniform precedent by this Court compels the conclusion that no duty of fair representation existed, nor could have existed in law, at the time of the UC hearing. That flaw is fatal to Petitioners' argument for review.

The duty of fair representation ["duty"] arises in the first instance only as a judicially created corollary to the *statutory right or authority* of a union to act as the exclusive bargaining representative of employees *within an appropriate bargaining unit* in their dealings with their employer pursuant to § 9(a) of the Act. *Vaca vs. Sipes*, 386 US 171 (1967); *Electrical Workers vs. Foust*, 447 US 42 (1979).

The seminal decision of this Court which created the duty was *Steele vs. Louisville & Nashville Railroad Company, et al.*, 323 US 192 (1944). That decision, and all which follow, makes clear that the duty arises *only* by virtue of the union's possession of the *actual authority* obtained under law to function as the exclusive collective bargaining representative within a craft or class of employees in their dealings with their employer.

Where, as here, an employer disputes the representational authority of a union to act on behalf of certain employees in the first instance, Congress has empowered the NLRB to act as the exclusive arbiter to define the appropriate bargaining unit within which the union may so function, under § 9(b). This representational bargaining scheme contained in the Act has been expressly

approved by the Court as being constitutional. *NLRB vs. Jones & Laughlin Steel Corp.*, 301 US 1 (1937) Under that scheme, a union's authority, *and the corresponding obligation of the employer to bargain* which is an essential component of that authority, exists when and to the extent the BOARD says it does.

The rationale enunciated by this Court for creation of the duty is to provide an obligation on the part of a union possessing such actual § 9(a) authority to act fairly and impartially on behalf of all employees which it is thereby authorized to represent. *Vaca* at 177; *NLRB vs. Allis-Chalmers Mfg. Co.*, 388 US 175, 181 (1967). Until such authority exists, no duty exists. Although LOCAL 199 possessed § 9(a) authority for the previously certified unit, it did not possess such authority for the positions occupied by Petitioners at the time of the UC hearing; because the BOARD had not yet said it did.

Hence, the duty of LOCAL 199 toward Petitioners did not exist prior to the UC hearing. It arose only after and as the result of the BOARD's determination that the previously certified bargaining unit for which LOCAL 199 possessed § 9(a) exclusive representational authority to bargain with UTF included the job categories occupied by Petitioners in fact and law, at the conclusion of the hearing. LOCAL 199 therefore possessed no obligation by virtue of such duty to notify Petitioners of the hearing which resulted in the BOARD's determination.

This fundamental fallacy in Petitioners' hypothesis, upon which all their "corollaries" and conclusions are based, destroys Petitioners' argument that their claim

against LOCAL 199 is "substantial". Petitioners assert that

> "the premiss [sic] of the accretion-doctrine is that a unit-*clarification* by the NLRB is warranted because the employees to be accreted into the pre-existing unit have *already* become, as a matter of fact and law, members thereof." (Petition, p. 24) (Emphasis in original.)

But such "premise" existed here only *after* the Board had made that factual and legal determination at the *conclusion* of the UC proceeding: not when LOCAL 199 earlier adopted its legal position or "claim" to § 9(a) representation rights in the absence of a corresponding bargaining obligation by UTF, who disputed LOCAL 199's "claim".

Accordingly, § 9(a) can neither logically nor legally be used as the "premise" for imposing a duty toward Petitioners upon LOCAL 199 prior to the UC hearing.

C. The District Court's Dismissal of LOCAL 199 Was Correct

That same flaw destroys Petitioners' contention that their claim against LOCAL 199 existed "independently" of their claims against the NLRB.[4] Since LOCAL 199 owed Petitioners no duty of fair representation prior to the UC proceeding, Petitioners' contention that they were owed notice thereof rests exclusively upon their claims against the NATIONAL LABOR RELATIONS BOARD,

---

[4] Petitioners disingenuously argue regarding their NLRB claims that § 9(a) is unconstitutional (Petition, pp. 13-16); yet their fair representation claim against LOCAL 199 survives only if § 9(a) *is* constitutional.

which established the accretion doctrine and its mechanisms: LOCAL 199 was merely a participant in a proceeding instituted by Petitioners' employer conducted by a government agency under rules which did not require Local 199 to provide notice to Petitioners. The District Court's dismissal of LOCAL 199 together with the NLRB, and on that basis, was therefore proper.

The claim that LOCAL 199 owed a *greater* duty toward Petitioners than either their employer who filed the UC petition and espoused their position thereat; or the NLRB, under whose auspices and procedures the proceedings were conducted, borders on the frivolous and is unworthy of review. Equally frivolous is the contention that review is warranted merely because LOCAL 199 did not file a Rule 12(b) motion seeking dismissal of Petitioners' NLRB claims upon which their claim against LOCAL 199 depends.[5]

---

[5] Although not argued in this brief, LOCAL 199 vehemently denies that Petitioners' claims against the NLRB have any semblance of validity. We contend that adoption of those claims by this Court would necessarily render the Act itself useless, for they would completely obvert the bargaining scheme embodied in the Act by requiring an employer to deal with a union through its employees rather than dealing with the employees collectively through the union: at its core, Petitioners' theory governing their NLRB claims would prevent a union from bargaining on behalf of any newly hired employee or any non-union employee in the bargaining unit unless prior notice to and consent of the individual had been accomplished. That is directly antithetical to Congress' intent; and it would destroy the sole basis for imposing a "duty of fair representation" upon a union in the first instance.

CONCLUSION

In sum, for over forty-six (46) years this Court has consistently maintained that the duty of fair representation arises at some point. That point is when a union actually possesses § 9(a) authority to function as the exclusive representative of an employer's employees within an appropriate bargaining unit. The duty is a check against actions of a union taken by virtue of that authority which are arbitrary in nature. Congress has designated the NLRB the sole determinant of whether that authority exists, having given it the power to define and certify appropriate units. That determination, of which Petitioners complain, was made by the NLRB only after, and as the result of, the UC proceeding. Prior to that determination no duty of fair representation by LOCAL 199 existed toward the Petitioners, according to almost fifty years of this Court's precedents; the logic behind them; and the legal basis for them.

Certiorari should accordingly be denied.

Respectfully submitted,

THOMAS J. PILACEK
Law Offices of:
THOMAS J. PILACEK, ESQ.
2101 W. State Road 434
Suite 105
Longwood, FL 32779
(407) 774-9500
Telecopier: (407) 774-8907

Counsel of Record
for Respondent
LOCAL 199